



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

James R. Sutton, Esq.
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150 Post Street
Suite 405
San Francisco, CA 94108

SEP 13 2013

RE: MUR 6673
David Lee for Supervisor 2012

Dear Mr. Sutton:

On November 1, 2012, the Federal Election Commission notified your client, David Lee for Supervisor 2012, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On September 10, 2013, the Commission found, on the basis of the information in the complaint, and information provided by you on behalf of your client that there is no reason to believe David Lee for Supervisor 2012 violated 2 U.S.C. §§ 441d, 441h, and 441i. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kimberly Hart, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

Cc: Thomas Li, Campaign Manager
David Lee for Supervisor 2012
4050 Geary Boulevard
San Francisco, CA 94118

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 6673

RESPONDENT:

David Lee for Supervisor 2012

I. INTRODUCTION

This matter was generated by a complaint filed by Wendolyn Aragon. *See* 2 U.S.C. § 437(g)(a)(1). David Lee was a 2012 candidate for San Francisco's Board of Supervisors. The Complaint alleges that David Lee for Supervisor 2012 ("Lee Committee") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations by (1) using a color scheme and slogan that would deceive voters into believing that the door hanger was official Democratic National Committee ("DNC") or Obama for America ("Obama Committee") campaign material; (2) using non-federal funds to pay for campaign material that advocated the election of federal candidates; and (3) failing to include a disclaimer stating that the door hanger was not official DNC or Obama Committee campaign materials or that the candidates featured on the door hanger did not necessarily endorse the other candidates appearing on the material.¹

The Commission found no reason to believe that the Lee Committee violated 2 U.S.C. § 441h by fraudulently misrepresenting itself. Further, based on its conclusion that the door hanger is not a "public communication," the Commission found no reason to believe that the Lee Committee violated 2 U.S.C. §§ 441i(f) or 441d.

¹ The Complaint also alleges that the door hanger failed to include a California Fair Political Practices Commission identification number as required by state law. Compl. at 1 (Oct. 22, 2012). The Commission did not make any findings regarding this allegation since the issue is outside of its jurisdiction.

1 **II. FACTS**

2 David Lee was an unsuccessful 2012 candidate for District 1 of the San Francisco Board
3 of Supervisors. His campaign committee was David Lee for Supervisor 2012, which filed
4 disclosure reports with the San Francisco Ethics Commission.²

5 The Lee Committee prepared and distributed a two-sided door hanger that is
6 approximately 17 inches long and five-and-a-half inches wide with an open circle at the top to
7 hang on a door knob. *See* Compl., Attach. (Oct. 22, 2012). The last lines of the back side of the
8 door hanger read: "Paid For By David Lee for Supervisor 2012." *Id.*

9 The front of the door hanger contains the word "FORWARD" in large white capital
10 letters with a blue background color scheme. *Id.* Small white text surrounding the circle part of
11 the door hanger states: "Delivered by a San Francisco Firefighter." *Id.*

12 The back side of the door hanger at the top reads in blue and red letters, "SAN
13 FRANCISCO FIREFIGHTERS URGE YOU TO VOTE FOR:," and features a circular seal that
14 reads "IAFF San Francisco Firefighters Local 798." Compl., Attach. The back of the door
15 hanger advocates the election of four candidates (two federal, one state, and one local) and
16 presents a position on five state- and local-ballot propositions. *Id.* The four candidate
17 endorsements appear in the top three quarters of the door hanger. The space is allocated equally
18 between endorsements for Barack Obama for President, Dianne Feinstein for Senate, Phil Ting
19 for Assembly, and David Lee for the Board of Supervisors. *Id.* The five ballot proposition
20 endorsements occupy the bottom quarter of the door hanger. *Id.*

² *See* S.F. Ethics Commission Campaign Finance and Filing Data at
<http://www.sfethics.org/ethics/2012/05/campaign-finance-filings-and-data.html>.

1 A disclosure report that the Lee Committee filed with the San Francisco Ethics
2 Commission indicates that the only cost associated with the door hanger is a \$1,500 payment
3 made to the "San Francisco Firefighters Slate Card (#1342688) during the period of October 1 –
4 October 20, 2012."³ The disclosure report does not indicate how many door hangers were
5 distributed or when they were distributed.

6 The Response argues that the Lee Committee did not mislead voters since the door
7 hanger clearly states, "Paid For By David Lee for Supervisor 2012." *See generally* Resp. at 1
8 (Nov. 21, 2012). Further, Respondent contends that Complainant cites to no provision of the Act
9 that requires a committee to include a disclaimer stating that its door hanger is not authorized by
10 a Presidential campaign or that no candidate on the door hanger endorses any other candidates
11 listed on the door hanger. *Id.* Respondent also argues that the Commission has not determined
12 that a door hanger constitutes a "public communication" that would require a disclaimer. *Id.* at
13 2, n.1. Finally, the Response claims that the Lee Committee used federal funds to pay for the
14 door hanger, and that this payment did not constitute an "expenditure" under the Act since the
15 door hanger qualifies for the "coattails exemption" of 11 C.F.R. § 100.148. Resp. at 2.

16 III. LEGAL ANALYSIS

17 A. Alleged Misrepresentation of Campaign Authority

18 Complainant alleges that the Lee Committee used the color scheme and slogan of the
19 Obama Committee in an effort to mislead voters as to the source of the door hanger. The
20 Complaint does not cite a provision of the Act but could be read to suggest a violation of
21 2 U.S.C. § 441h(a)(1). That provision provides that no federal candidate, employee, or agent of
22 such candidate shall "fraudulently misrepresent himself or any committee or organization under

³ See S.F. Ethics Commission Campaign Finance and Filing Data at
<http://www.sfethics.org/ethics/2012/05/campaign-finance-filings-and-data.html>.

1 his control as speaking or writing or otherwise acting for or on behalf of any other candidate . . .
2 on a matter which is damaging to such other candidate." *Id.*

3 The Lee Committee did not violate section 441h(a)(1). Lee was not a federal candidate,
4 or the agent or employee of a federal candidate. Furthermore, Lee and his Committee did not
5 represent on the door hanger that they were acting on behalf of President Obama or Senator
6 Feinstein — the door hanger identifies the Lee Committee as the party responsible for the door
7 hanger. Finally, the door hanger is not in any way potentially damaging to President Obama or
8 Senator Feinstein; to the contrary, the hanger urges the reader to vote for Obama and Feinstein.
9 Accordingly, the Commission found no reason to believe that the Lee Committee violated
10 2 U.S.C. § 441h(a)(1).

11 **B. Alleged Use of Non-federal Funds**

12 The Complaint alleges that the Lee Committee spent non-federal funds⁴ for a
13 communication that expressly advocates for the election of federal candidates in violation of
14 2 U.S.C. § 441i(f). *See also* 11 C.F.R. § 300.71. Under section 441i(f), state and local
15 candidates may spend only funds that "are subject to the limitations, prohibitions, and reporting
16 requirements" of the Act on a "public communication" that refers to a clearly identified
17 candidate for federal office and that promotes, attacks, supports, or opposes any candidate for
18 that office. *See also* 2 U.S.C. § 431(20)(A)(iii). A "public communication" is "a
19 communication by means of any broadcast, cable, or satellite communication, newspaper,
20 magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or
21 any other form of general public political advertising." 2 U.S.C. § 431(22).

⁴ The Commission's regulations define non-federal funds as "funds that are not subject to the limitations and prohibitions of the Act." 11 C.F.R. § 300.2(k).

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1 The Lee Committee did not violate section 441i(f) because its door hanger is not a
2 “public communication.” Instead, the door hanger qualifies as a type of “handbill” that the Act
3 distinguishes from such public communications. By definition, a “handbill” is “a small printed
4 sheet to be distributed (as for advertising) by hand.” *See Merriam Webster's Dictionary*, at
5 <http://www.merriam-webster.com/dictionary/handbill>.

6 The Commission has determined that a handbill is not a “public communication” under
7 section 431(22) if, at the least, the handbill meets the requirements of the so-called “coattails
8 exemption” of 2 U.S.C. §§ 431(8)(B)(ix)-(x), 431(9)(B)(viii).⁵ *See also* 11 C.F.R. §§ 100.88,
9 100.148. The coattails exemption provides an exception to the Act’s definitions of
10 “contribution” and “expenditure” for certain campaign materials used in connection with
11 volunteer activities — including “handbills” — so long as the cost of the material allocable to
12 federal candidates was paid for with contributions subject to the “limitations and prohibitions” of
13 the Act. 11 C.F.R. §§ 100.88, 100.148. Accordingly, a handbill that qualifies for the coattails
14 exemption is not a public communication.

15 Here, the door hanger qualifies for the coattails exemption. It was hand delivered to
16 potential voters by volunteers from the San Francisco Fire Department. *See* Compl., Attach. Its
17 entire cost, including the portion allocable to federal candidates, was paid for by the Lee
18 Committee with funds subject to the limitations and prohibitions of the Act. The Lee Committee
19 reported paying \$1,500 for the door hanger on its disclosure report covering the time period of
20 October 1 to October 20, 2012. *See* <http://www.sfethics.org/ethics/2012/05/campaign-finance->

⁵ *See* Certification, MUR 5604 (Mason); Statement of Reasons, Comm’rs Toner, Mason, and von Spakovsky at 3, 5-6, MUR 5604 (Mason); Statement of Reasons, Comm’rs Lenhard, Walther, and Weintraub at 2, 4-5, MUR 5604 (Mason). Three Commissioners concluded that *all* handbills fall outside of the definition of “public communication” (and thus those that qualify for the coattails exemption necessarily fall outside of the definition), while three Commissioners more narrowly concluded that only those public communications that qualify for the coattails exemption are not “public communications.” *Compare* SOR, Comm’rs Toner, Mason, and von Spakovsky at 4-5, with SOR, Comm’rs Lenhard, Walther, and Weintraub at 3-4.

1 filings-and-data.html. That report also disclosed a cash-on-hand balance of \$26,891.99. *Id.* The
2 available information indicates that the Lee Committee received no contributions that exceeded
3 \$500, and no corporate or foreign national contributions. *Id.* In fact, the San Francisco
4 Campaign and Governmental Conduct Code imposed a limit of \$500 on contributions to the Lee
5 Committee, which is well below the then-applicable federal individual contribution limit of
6 \$2,500.⁶ See S.F. Camp. & Gov't. Conduct Code § 1.114(a) (2012). Further, San Francisco
7 Campaign and Governmental Conduct Code barred the Lee Committee from accepting
8 contributions from corporations and foreign entities. *Id.* § 1.114(b) (2012).

9 Because the door hanger qualifies as a handbill under the coattails exemption, it is not a
10 "public communication" subject to the prohibition at 2 U.S.C. § 441i(f). Therefore, the
11 Commission found no reason to believe that Lee Committee violated 2 U.S.C. § 441i(f)(1) and
12 11 C.F.R. § 300.71.

13 **C. Alleged Failure to Include a Proper Disclaimer**

14 The Complaint alleges that the Lee Committee failed to affix a disclaimer to the door
15 hanger stating that the hanger was not official DNC or Obama Committee material, or a
16 disclaimer stating that no candidate featured endorsed the other candidates featured. Compl. at
17 1. The Response states that the Commission does not require such a disclaimer, and that the
18 Commission has not decided that a door hanger constitutes a "public communication" requiring
19 any type of disclaimer. Resp. at 2.

20 Generally, 2 U.S.C. § 441d requires certain communications to carry a disclaimer
21 identifying who paid for the communication. Here, as discussed above, the door hanger is not a

⁶ At the relevant time, 2 U.S.C. § 441a(a)(1)(A)'s limit was \$2,500. The limit has since been adjusted upwards for inflation to \$2,600. See *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530-02, 8532 (Feb. 6, 2013).

1 "public communication" because it qualifies for the coattails exemption. *Supra* Part III.B. Thus,
2 the door hanger did not require a disclaimer pursuant to 2 U.S.C. § 441d,⁷ and accordingly, the
3 Commission finds no reason to believe that the Lee Committee violated 2 U.S.C. § 441d.

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⁷ The Lee Committee did affix language to the door hanger clearly indicating that it was responsible for the door hanger.